NO. 21818

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALTER ADAMS,	)
	)
Appellant,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA and CALIFORNIA STEVEDORE & BALLAST COMPANY,	)
	)
	)
Appellee.	)
	)
	)

APPELLANT'S REPLY BRIEF

DORSEY REDLAND
JOHN A. McGUINN

1182 Market Street
San Francisco,

Attorneys for Appellant

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APPELLANT'S REPLY BRIEF

In this Reply, we have endeavored to reduce Appellees' argument to what we conceive its basic contentions to be, and then reply to them. At the outset, we do not think that Appellees have in any real measure joined issue with us, or reached the basic question before the Court.

I
THE TRIAL COURT FAILED TO DECIDE THE BASIC ISSUE OF THE CASE: DID THE PALLET BOARD BREAK

A. THERE WAS AMPLE EVIDENCE TO MAKE SUCH A FINDING

In its Brief, appellee asserts initially that, based on appellant's evidence, the Court below could not make a finding that the pallet board did in fact break. The appellant testified that the pallet board on which he stood, broke causing him to fall to the deck below. Herman Victor, a fellow longshoreman, observed the appellant lying on the deck and saw a pallet board suspended in the air on the forks of the lift truck; he noticed that the end of one of the boards of the pallet board was broken and he further observed a broken piece of wood on the deck near Adams (R.T. 15, 16).

Appellant submits that the foregoing evidence clearly shows that it was not a matter of appellant's failing to prove that the pallet board broke but rather the Court's failure to consider and pass upon this material issue.

Appellee suggests at the top of page 7 of its brief, that by failing to find that the injury occurred as alleged by Adams, the Court inferentially disbelieved him. What this means is difficult to determine. First, the Court stated unequivocally

that there was an accident (see Transcript of Record, page 147 lines 6, 13-15). Secondly, if the Court did not believe Adams it would have said so. Thirdly, it is doubtful that the Court would have indulged in such lengthy Findings of Fact concerning the "four on - four off" system and the dangers inherent in un-seated fork-lifts if it did not believe Adams.

Ironically, the alternatives were stated by the Court in the last sentence of the Fourth Finding of Fact but never passed upon:

> "However, it is not necessary to determine if the pallet board broke or if Adams merely slipped to dispose of this case". (Transcript of Record, page 145 lines 15-17).

B. THE VESSEL WAS UNSEAWORTHY AS A RESULT OF OPERATIONAL NEGLIGENCE

For purposes of discussion, appellant will assume that the board did not break. Despite this fact the vessel was nevertheless unseaworthy under the facts presented as a result of the improper use of proper equipment by the longshoreman. *Blassingill vs. Waterman S.S. Corp*; (9 Cir. 1964) 336 F. 2d 367, 1964 A.M.C. 1932. The scheme of using a lift jitney with a pallet board on its forks as a means of conveying longshoremen from the deck to places above it, coupled with the failure to

provide ladders or steps, is operationally negligent. Such negligence amounts to unseaworthiness. *Grillea vs. United States* (2 Cir. 1956) 232 F. 2d 919, 1956 A.M.C. 1009. *Huff vs. Matson Navigation Co.* (9 Cir. 1964) 338 F. 2d 205, 1964 A.M.C. 2219.

Appellee's chief liability witness, K. B. GRAUNSTEDT, testified that the longshoremen loading the cargo work as directed (R.T. 189, lines 24-25; page 190, lines 1-13; page 194, lines 22-25). He further testified that the primary obligation and concern of the stevedore is to get the ship loaded properly and under way (R.T. 199, lines 21-25; page 200, line 1). As long as the men get to the top of the conax van to load the cargo, that's what counts (R.T. 200, 201).

The evidence is uncontradicted that the only means provided the longshoremen to get to the conax vans were pallet boards. As such there is nothing to hold on to should a longshoreman slip or should one of the boards break. The most obvious appliance to use under these circumstances is a ladder but none were furnished nor were they even mentioned as an alternative by K. B. GRAUNSTEDT.

A brief review of some of the more important cases adequately illustrates this basis of liability. In *Skibinski vs. Waterman S.S. Corp.* (2 Cir. 1966) 360 F. 2d 539, 1966 A.M.C. 873,

a welder-seaman was struck by a steel ladder which was being lowered into the hold of the vessel by means of the ship's winches. In order to lower the ladder through the hatch the longshoremen inserted an open mouth, "S" shaped cargo hook under the top rung of the ladder. When the foot of the ladder reached the floor of the hold, the ladder disengaged itself from the hook and rebounded against the plaintiff.

The Second Circuit found that the open mouth hook was unsuitable for the use to which it was put. "Improper use of otherwise sound equipment may give rise to a condition of unseaworthiness...Here, the longshoremen, by improperly using an open mouth hook, fashioned an apparatus which was patently unsuitable for the job to which it was put." *Skibinski vs. Waterman S.S. Corp., supra,* 360 F. 2d 539, 542.

In *Reid vs. Quebec Paper Sales & Transportation Co.,* (2 Cir., 1965) 340 F. 2d 34, 1965 A.M.C. 112, a thirty five foot unsecured portable ladder was left unattended by a longshoreman. Subsequently, it fell injuring a fellow longshoreman. The Court, per Mr. Justice Thurgood Marshall, said at page 35:

> "Under the circumstances it was necessary for the ladder to be secured in some fashion when it was being used, and unless it was so secured, it was unfit for its intended use. An unsecured, and dangling ladder under the conditions existing

> at the time of the accident posed a serious threat to the safety of those standing below in the hold, regardless of whether the shipowner knew it was unsecured and regardless of how quickly this threat materialized."

and again at page 36:

> "For here the ladder was not a suitable means of egress from the hold, under the existing circumstances, unless it was secured in some fashion, either by some mechanical device or by a workman holding it in place."

In *Thompson vs. Calmar S.S. Corp.* (3 Cir. 1964) 331 F. 2d 657, 1964 A.M.C. 2249, longshoremen moved freight cars on the pier by attaching bull winches to some of the freight cars and, utilizing the power of the ship's engines, bumped unloaded freight cars out of the way and loaded ones in place under the ship's booms. The "bumping" process occurred with such force that the plaintiff longshoreman was catapulted from one side of the "bumped" freight car to the opposite side causing serious injuries. In affirming the verdict, the Third Circuit Court stated at page 659.

> "Further, the unseaworthiness of a vessel or its equipment may arise from acts of the longshoremen crew, or, indeed, of the injured longshoreman himself."

It is clear from the cases cited that a vessel can be rendered unseaworthy by the improper use of otherwise seaworthy equipment. Unfortunately, the Court never passed upon this issue either.

II

THE SAFETY REGULATIONS AND UNION AGREEMENT UPON WHICH APPELLEE RELIES ARE IRRELEVANT

The bulk of appellee's brief is devoted to the discussion of the immorality of the "four on, four off" system and the evils attendant when a driver leaves the seat of his fork-lift with a load in the air. Appellee has not shown, however, the relevance of these alleged violations or how they proximately contributed to the accident in question.

Nor are the cases of *Logan vs. Empresa Lines*, 353 F. 2d 373, 1966 A.M.C. 92, and *Jefferson vs. Taiyo Katun, K.K.* 310 F. 2d 582 of aid to appellee. In the *Logan* case the jury, by special verdict, found that the hatch board fell because of unexplained reasons and not because it was too short or because it was dragged out of place by stevedoring operation. The *Jefferson* case was an appeal from an adverse *jury verdict*; no findings of fact or conclusions of law were made. In effect, the Fifth Circuit, in affirming, merely stated that it was not inconsistent to find that dunnage broke yet the vessel was not rendered unseaworthy.

For the foregoing reasons, it is respectfully requested that this case be reversed and a new trial ordered.

Dated: San Francisco, California, January 8, 1968.

Respectfully submitted,

DORSEY REDLAND
JOHN A. McGUINN

/s/ Dorsey Redland

Attorneys for Plaintiff and Appellant

CERTIFICATE OF CONFORMANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and in my opinion the foregoing is in full compliance with those rules.

/s/ John A. McGuinn

JOHN A. McGUINN